

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties, the Appeals Board finds:

(1) The finding by the Administrative Law Judge that claimant is entitled to an award based upon a general bodily injury and not two (2) separate scheduled injuries should be affirmed. The Appeals Board also agrees with the finding by the Administrative Law Judge that claimant has sustained a seventy-two and one-fourth percent (72.25%) permanent partial general body disability.

In keeping with the bright line rule, announced by the Kansas Court of Appeals in Berry v. Boeing Military Airplanes, Docket No. 71,007, we find date of injury in this case to be July 30, 1992, claimant's last day of work.

The Appeals Board finds that the findings of fact and conclusions of law as enumerated in the Award of the Administrative Law Judge are accurate and appropriate, with the exceptions of accident date and Conclusion No. 3 concerning Kansas Workers Compensation Fund liability. The Appeals Board adopts all other findings and conclusions made by the Administrative Law Judge. The Appeals Board specifically adopts the analysis of the Administrative Law Judge regarding work disability as it is supported by the evidence and is consistent with the testimony of Dr. Ernest Schlachter and Dr. Nick R. Wheeler that the work claimant did between March 1992 and July 1992 aggravated and accelerated her condition.

(2) The Kansas Workers Compensation Fund shall be liable for fifty percent (50%) of the cost of this Award.

In this case, the claimant first sustained an injury to her left upper extremity and then her right, with subsequent mini-traumas or overuse syndrome to both upper extremities. The claimant's testimony, as well as the opinions of the medical experts, suggests that there is a direct causal relationship between the injury on the left and the development of overuse syndrome on the right. Accepting that the date of accident is deemed to be the last date worked, it would be easy to create a bright line rule in all repetitive trauma cases where the ultimate disability would always be found to have probably or most likely not have occurred but for the pre-existing physical impairment such that the Fund would be one-hundred percent (100%) liable in all repetitive trauma cases. Although the creation of such a bright line rule could be justified and certainly would be easy to apply, the Appeals Board believes that it ignores the factual nuances that regularly appear in these cases. For example, in this case claimant had an onset of symptoms in her left upper extremity as a result of a single traumatic event. Claimant would not have been considered a handicapped employee prior to that injury. Likewise, there was a single traumatic event causing injury to the right upper extremity. In between these injuries and thereafter, claimant suffered aggravation as a result of mini-traumas. It is these mini-traumas from which much, if not all, of claimant's disability results. The Administrative Law Judge obviously took into consideration this sequence of events in arriving at her method for assessing liability against the Workers Compensation Fund. She surmised that the claimant would not have a work disability but for the overuse problem that developed on the right upper extremity following the injury to the left. Accordingly, she developed a method of apportioning liability between the respondent and the Kansas Workers Compensation Fund whereby the respondent would pay a percentage of the work disability

award commensurate with the percentage of functional impairment to the left upper extremity.

The Appeals Board agrees that there should be some apportionment of liability between the respondent and the Kansas Workers Compensation Fund. Because a reasonable apportionment cannot be found from the medical testimony, some other method must be employed. K.S.A. 44-567(a)(2) provides that “. . .the administrative law judge shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment”

In the view of the Appeals Board, the mathematical formula employed by the Administrative Law Judge does not fully take into consideration what should be the responsibility of the respondent with regard to the overall and ultimate work disability. To assess against the respondent liability only for the functional impairment to the left upper extremity would understate the significance of that impairment to the overall work disability. In addition, the fact that claimant continued to work following her initial injury in a manner which aggravated and accelerated the injuries to both upper extremities, deserves some consideration in the method of apportionment as well. Even if we accept the premise that the injury and resulting disability to the right upper extremity probably or most likely would not have occurred but for the injury to the left, an equitable and reasonable apportionment of the award would, to the Appeals Board, seem to be an equal division of one-half each to the respondent and the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated January 25, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ruperta Diaz, and against the respondent, Beech Aircraft Corporation, and Beech Aircraft Corporation as a qualified self-insured, and the Kansas Workers Compensation Fund, for an accidental injury sustained on July 30, 1992, and based upon an average weekly wage of \$623.08, for 59.42 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$17,172.38, followed by compensation at the rate of \$299.00 per week, not to exceed \$100,000.00, for a 72.25% permanent partial general body disability. The liability for payment of this Award shall be assessed one-half against the respondent and one-half against the Kansas Workers Compensation Fund.

As of March 31, 1995, there is due and owing claimant 59.42 weeks of temporary total disability compensation at the rate of \$289.00 per week or \$17,172.38, followed by 79.72 weeks of permanent partial disability compensation at the rate of \$299.00 per week in the sum of \$23,836.28, for a total of \$41,008.66, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$58,991.34 is to be paid for 197.30 weeks at the rate of \$ 299.00 per week, until fully paid or further order of the Director.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed one-half against each the respondent and the Kansas Workers Compensation Fund to be paid direct as follows:

Deposition Services	
Transcript of regular hearing	\$240.90
Barber & Associates	
Deposition of Ernest R. Schlachter, M.D.	\$178.00
Deposition of Jerry D. Hardin	\$306.60
Deposition of Nick R. Wheeler, M.D.	\$190.60
Deposition of Sharon Herridge	\$170.60

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Terry J. Torline, Wichita, KS
Michael D. Streit, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director